Theodore Dwight 1809

CASES AND QUERIES

SUBMITTED TO EVERY

CITIZEN OF THE UNITED STATES,

AND ESPECIALLY

THE MEMBERS OF THE ADMINISTRATION

AND OF

BOTH HOUSES OF CONGRESS,

AS DESERVING

TO BE IMPARTIALLY CONSIDERED BY THEM.

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☞ *THERE is no treaty or other convention between us and Great-Britain; and, as it respects France, the following Cases, and the reasonings from them, are as supposing there is none between us and her,* defining *or* declaring *what shall be* deemed *the* rule, *in the respective cases, relative to the mutual rights and duties between a belligerant and a neutral.*

CASES AND QUERIES,

&c.

FIRST CASE.

NEITHER France or Great Britain had ever, prior to the French decree of Berlin, claimed it as *the rule* or *law*, between belligerants and neutrals, that the vessel of the neutral being bound to a port of *one*, is, *of itself*, sufficient *cause* of capture, to the *other*, of the belligerant parties—France has by the above decree claimed, or assumed, such to be the *rule*, and has accordingly captured our vessels, and condemned them, with their cargoes, when bound to a British port; and we having *submitted* to the claim, or (and which is the same thing,) we not having ~~not~~ *resisted*, by *arms*, the exercise of

it, Great Britain, while she admits that no such *rule* exists, at the same time, claims, that we having *submitted* to it when claimed by France, she is thereby, and as against us, entitled also to avail herself of it, and accordingly captures and condemns our vessels, with their cargoes, when bound to a French port.

SECOND CASE.

AS to the right to capture the goods of an enemy *on the seas*, Great Britain claims the *rule* to be, that free ships *do not* make free goods. Supposing France to admit the contrary to be the rule, that free ships *do* make free goods, then Great Britain would capture and condemn French property on board our vessels; whereas, France, according to the rule, as admitted by her, must let British property on board our ships, pass, as *free*; and supposing us to *submit* to the rule, as claimed by Great

Britain; then QUERY: would we be entitled to hold France to the rule, as admitted by her, or would she not, as against us, be entitled to avail herself of it, as claimed by Great Britain.?

THIRD CASE.

AS to the rule concerning articles *contraband of war*—Suppose France to claim *provisions* to be *within* the rule, and Great Britain to admit them to be *not within* it; in that case France would capture and condemn *provisions* on board our vessels, bound to a British port, whereas Great Britain, according to the rule as admitted by her, must let the provisions on board our vessels, bound to a French port, pass, as *innocent*. Here therefore again, only changing the places of the two belligerant parties, the like question occurs:—If then, in the second case, France would have a right to capture British property found on board our vessels, and if in

the third case, Great Britain would have a right to capture *provisions* on board our vessels bound to a French port, does it not follow that she has now, in consequence of the French decree, authorizing the capture of our vessels when bound to a British port, and our *submission* to it, a right to capture our vessels when bound to a French port? or, are not the first case and the second and third cases the same in *principle*, as it respects the right of a belligerant, when its opposite belligerant has *assumed* a rule of capture against neutrals, and a neutral has *submitted* to it, also to *assume* against the neutral so *submitting*, the like rule? and does it not then further follow, that the right of Great Britain to capture our vessels when bound to a French port, rests wholly on the *rule* or *law* that *neutrality* must not only be *impartial*, as free from *collusion*, but also *equal*, between the neutral and both the belligerants, so that the neutral is not to *submit* to the enjoyment of a right against her by *one*, and *resist* the exercise or enjoyment

of it by the *other*. Neither of them is to be, as it were, the *more favoured* party with the neutral. It is a rule of universal law, that "*equity is equality*," and it is *convertible*, a want of *equality* is a want of *equity*; and is it not essential to *equality* between us and Great Britain, that as long as we *submit* to the rule *priorly* assumed by France, to capture our vessels when bound to a British port, we are not entitled to *resist* Great Britain when she *subsequently* assumes the like rule, and captures our vessels when bound to a French port? Is not Great Britain entitled to tell us, that although we would have been justifiable in considering the decree as an act of *hostility*, and instantly made *reprisals*, and if so, that a *state of war* would now exist between us and France, yet, that we having *elected* to consider it as an act done under *colour* of a *right*, and if so, that until discussion and disagreement between us and France, we persisting to *deny*, and she to *assert* and *exercise* the right, and the disagreement followed up by *resistance*

on our part, a state of *peace* still continues between us and France, she (Great Britain) is *content*, as between her and us, *formally to affirm* the French decree as an act done under *colour* of *right*, and accordingly, that she is entitled to have the captures by her of our vessels bound to a French port, considered by us as acts under the like right? It must, however, be at the same time stated, that if she insists on the affirmative of this question from us, it will follow, that the instant we *elect* to consider the decree as an act of *hostility*, by *resisting* it as such, even perhaps if the resistance should be only a *convoy* of our vessels bound to British ports, she has no longer a right to capture our vessels bound to a French port—that this right in her depending on our *submission* to the French decree as its *cause*, the instant the *cause* ceases, the right, as its *effect*, then also *ceases*—that she has then no longer reason to complain of *inequality*: she has no longer, as it were, an *equity* from us to be *satisfied*—and that if she should

then continue to capture and condemn our vessels, with their cargoes, bound to French ports; it must be on some other ground, than as being entitled to an *equality* of right, against us, with France—as, for instance, for supposed *breach* of blockade. The question of blockade, however, or whether a belligerant has, under any circumstances, a right by mere proclamation, or any other act to the effect of a proclamation, or in any manner without an *actual* competent force, a right to constitute a *blockade*, and so to capture and condemn the vessel of a neutral attempting to enter the declared blockaded port? not having any necessary relation to the other questions intended to be examined, is therefore passed by. Great Britain will also, probably, as under her supposed rule, known as the *rule* of '56, continue to capture our vessels when found in the French *colonial*, as being to us an *unaccustomed*, trade. This rule will be so far noticed, as to *test* it with the rule or principle of *equality*.

To return to the intended subject of inquiry:— Not only many among us, but even the British ministry themselves, endeavour to justify the claim of Great Britain to assume the like rule, *priorly* assumed by France, or the British *orders in council*, the acts exercising or enforcing the claim, by considering them as acts of *retaliation* on France. If the above reasoning is correct, then to place the claim on the ground of *retaliation* is certainly a mistake. This, however, will make no difference, as it respects our conduct to Great Britain, in reference to the claim. The question between us and her is, whether the claim is, or is not just in itself? and not, whether the true ground of it has been unperceived? There may be an act of *reprisal* by one nation against another, till *then* at *peace*, as a mean to obtain *reparation* for an *injury*, but *retaliation* supposes a then *already* state of *war*, and not thereby to be *repaired* for *injury*, but to *punish* for *cruelty*. As between the belligerants themselves, their rights are in one sense *unlimited*,

either of them may, for its own *preservation*, pursue the other to *destruction*; but still those rights are, in another sense, limited by certain *temperaments*, as the jurists express themselves, or *mitigations* of the rights, acknowledged and observed by *civilized* nations; and every exercise of a right beyond the due *temperament*, according to the circumstances of the case, is *cruelty*. A belligerant has a right to the *life* of his enemy; but he may not take it away in *cold blood*, as it is phrased; according to a due temperament, or mitigation of the right, it is *cruelty* in him; and it is for acts of this nature that one belligerant *retaliates* on the other. Indeed, having already the greater right to the *life*, or *person* of the enemy, and consequently the *lesser* right to his *property*, when captured, there is nothing, as a *distinct*, or *farther* subject, left, on which an act of *retaliation*, viewed as an act by one belligerant, to obtain *reparation* for *damage* arising from an act by the other belligerant, considered as an *injury*, can operate. Retalia-

tion can therefore be only *punitive*, or with intent only either to *amend* or *deter*; and therefore, must necessarily be inflicted *immediately* on the *guilty* party: and if it affects a third, or *innocent* party, it must be only *consequentially*, or *casually* so; but in the present case, Great Britain captures and condemns our vessels and cargoes, we being the third or *innocent* party, France having *no interest* in them, not to be *gainer* by their safe *arrival*, nor a *loser* by the *capture* and *condemnation* of them by Great Britain; and this capturing our vessels and cargoes by Great Britain, is with intent thereby to prevent France from the *benefit* she might otherwise have from the *trade* carried on between her and us in our *own vessels*, and on our *own account*, and so to affect her, in its *consequences* to her *detriment*, and thereby to coerce, or induce her to revoke her decree. Surely this sort of *retaliation* is inverting the very nature and order of things! but it ought to suffice to shew the futility of the notion of retaliation, as applicable to the

case, that the effect of the British orders in council has happened to be the very reverse of *punitive*; for if the French decree has produced the British orders, and if they have produced our embargo, then the decree has eventually produced a *consummation*, than which it is not possible to conceive one more *devoutly to have been wished for* by the individual possessing the sovereignty of France: that very enemy on whom it would seem even Great Britain herself imagines she is *retaliating* for it.

Now briefly to notice the British rule of '56. It is requisite previously to state, that a *duty* from a neutral to a belligerant, involves a correspondent or correlative *right* in the belligerant, to require the observance of it; and *in the converse*, a *right* in the neutral involves a correspondent *duty* in the belligerant—that rights and duties are founded equally between nations as between individuals, in *morality*—that a *breach* of *duty* being *immoral*, a claim of a

right by either *one* of the parties not involving or necessarily supposing a correspondent duty in the other, to allow the exercise or enjoyment of it, is an *immoral* act—that acts by one belligerant occasioning loss or damage, and *immediately* affecting a neutral, are to be distinguished between those done as from *necessity*, and those done as under a *belligerant right*, a right arising from the relation or condition the parties stand in to each other, the one, the belligerant, being at *war* with *another* nation, and the other, the neutral, being *at peace* with *both*—that, as to acts of the *former* class, necessity having *no law*, all perhaps that is requisite to justify them, is that they be not done *rashly*, that they be done in good faith, as from *necessity*, and not under *pretence* of it, and that *recompense* be made for them; hence a belligerant may, for his safety or preservation, capture the vessel and cargo of a neutral, and detain them till the *necessity* ceases, or *use* them as if taken by *impress*, but he must always make *recompense*; and that as to

the acts of the *latter* class, and in reference to the *right* of *capture* on the *seas*, the subject of the present inquiry, the right to capture, includes, or draws after it, as a consequence, a right to *condemn* or *confiscate*, and which can only be for a *fault* or *wrong* in the *neutral*, consisting in a non-observance or *breach* of his *duty* of neutrality.

These matters being premised, it is now to be stated, that what has been advanced to prove *equality* to be the only foundation of rights between belligerants and neutrals, may be reduced to these two propositions—First, that a belligerant cannot LEGALLY claim any thing as a right against the neutral, which the other belligerant may not also legally claim: and secondly, that where one belligerant has *claimed* and *exercised* a right, and the neutral has *submitted* to it, the other belligerant may LEGALLY *exercise* it also. If these propositions are true, then the question presents itself—Is the Brit-

ish rule of '56 just? and this is a question suggested to the present judge of the British admiralty, to be *reviewed* by him, and *impartially*, between us and Great Britain—is he not pledged, that when called upon, he will?—Hear him, in deciding between Great Britain and Sweden, in the case of the Swedish convoy, and it deserves to be written in letters of *gold*. "In forming "my judgment, I trust that it has not escaped "my anxious recollection for one moment, what "it is that the duty of my station calls from me; "namely, to consider myself as stationed here "not to deliver occasional and shifting opinions "to serve present purposes of particular nation- "al interest, but to administer with *indifference* "that *justice* which the *law of nations* holds out, "*without distinction*, to independent states, some "happening to be *neutral*, and some to be *bel-* "*ligerant*. The *seat* of judicial authority is in- "deed locally *here*, in the belligerant country, "according to the known law and practice of "nations: but the *law* itself has *no locality*. It

" is the *duty* of the person who sits *here* to de-
" termine this question exactly as he would de-
" termine the same question if sitting at *Stock-*
" *holm;* to *assert no pretensions* on the part of
" *Great Britain,* which he *would not allow* to
" Sweden in the same circumstances, and to *im-*
" *pose* no duties on *Sweden,* as a *neutral* country,
" which he would not *admit* to *belong* to *Great*
" *Britain* in the *same character.*"

What the rule, alluded to, was IN '56, is difficult, perhaps impossible, now to ascertain, it not being any where to be found *in terms,* and there not being *reports* of condemnations, if any, under it during the succeeding period of the then war, and so to be considered as *cotemporaneous* expositions of it. From a reference to it by Lord Mansfield, in 1761, it would seem as if it was intended to apply only to a *neutral* vessel trading to a belligerant *colony,* with *all* the *privileges* of a belligerant vessel, and consequently to be *deemed* such, and therefore liable to cap-

ture and condemnation. His words are—" the " rule is, that if a *neutral* ship trades to a French " *colony* with *all* the *privileges* of a French ship, " and is *thus* adopted and *naturalized*, it must " be *looked upon* as a French ship, and is liable " to be taken." The present judge of the British admiralty, in 1799, understands, or explains, or expounds the rule, when exemplified between Great Britain and France as the belligerants, to be, in substance, that it is not competent for a neutral to accept from France, during the present war, a permission to carry on a trade with her colonies, which the neutral was not accustomed to have in time of *peace*, " *because*, as " he expresses himself, Great Britain having, by " her *superiority* at sea, brought France un- " der an entire *inability* to supply her colonies, " and export their products, the permission to " neutrals to trade with her colonies does not " proceed from her *will*, but her *necessity*; it is a " measure not of French *councils* but of *British* " *force*; and that this *predominance* of the Brit-

"ish *force* at *sea* is the *true* FOUNDATION of the "*principle*." Hence it follows, that Great Britain not being reduced to this state of *inability*, it would be morally right in us to *accept*, involving that it would be morally right in Great Britain to *grant*, a permission to carry on a trade with her colonies, beyond what we were *accustomed* to carry on with them in *time of peace*, and if so, then it would be morally wrong in France to capture our vessels and cargoes, and condemn them, for carrying on such unaccustomed trade, inasmuch as she is not in *condition*, she wants, as it were the requisite *qualifications*, to entitle herself to the rule; she is not *superior* or *dominant* at *sea*—Great Britain practised on the rule as so understood, or on the supposed *difference* of *condition* between her and France, when in 1794 she offered us a trade with her colonies. Supposing then Great Britain to capture our vessels when found in the French *colonial* trade; and supposing France, if we had accepted from Great Britain the offer referred to, had captured our

vessels when found in the British *colonial trade*, would Great Britain be entitled to require from us to *resist* France? Undoubtedly in order to be consistent with herself she must have claimed herself to be so entitled, and must accordingly have *admitted* that whenever France becomes *superior* at *sea*, she will then have the right to capture our vessels when found in the *British* colonial trade, and that then the right of Great Britain to capture our vessels, when found in the *French* colonial trade ceases until she *again* becomes *superior:* in short, that the right as it were *opens* and *shuts* according as the *superiority*, of the one or the other nation, shall from time to time happen to exist;—that she having *now* the *superiority* the right has *opened* to her and is *shut* against France, that *when* France shall acquire the *superiority* it will then be *shut* against *her* and *open* to *France;* and it is in this way that the *equality*, as to the right or the enjoyment of it, is to take place between her and France.

I ask, and I ask it in the name of *reason*, what kind of *equality* is this? I ask what kind of a *rule* must it be, which, when analyzed, resolves itself into the conclusion, that the right of a belligerant to capture the vessel of a neutral in an *unaccustomed* trade with his enemy, depends on the *fact*, whether the belligerant, or his *enemy*, is for the time *superior* at *sea*?—Such however is *virtually* adjudged by the judge of the British admiralty to be the FOUNDATION of the rule.

Great Britain is now *predominant* on the ocean; but it behoves her to bear in mind, that France may be permitted to become predominant *there* also in turn, and to be the instrument to scourge her: from which, however, may all-gracious heaven forbear! for surely every friend to truth, justice, knowledge, religion, and whatever hath aught of moral or intellectual worth or excellence, must have an anxious distressing concern for her fate, and that she may be spared from the *indignation*; there being much reason to dread that

if she perishes, it will all perish with her, and that universal bondage, debasement, ignorance and gloom will ensue.

—"*Nox atra caput tristi circumvolat umbra.*"

IMPARTIAL.

FINIS.